Filed 2/9/16 Davis v. Brown, Wegner & Berliner CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JAIMIE ANN DAVIS,	
Plaintiff and Appellant,	G050439
v.	(Super. Ct. No. 30-2013-00623126)
BROWN, WEGNER & BERLINER LLP, et al.,	O P I N I O N
Defendants and Respondents.	

Appeal from a judgment of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Affirmed.

Qian & Nemecek and David P. Nemecek, Jr., for Plaintiff and Appellant.

Waxler, Carner and Brodsky, Barry Z. Brodsky and Jodi L. Girten for Defendants and Respondents.

*   *   *

Plaintiff Jaimie Ann Davis appeals the granting of summary judgment in favor of defendants law firm, Brown, Wegner & Berliner LLP, and attorneys William J. Brown, Jr., and Matthew K. Wegner on her actions for legal malpractice, breach of fiduciary duty, and breach of contract. Davis alleges her evidence established triable issues of material fact in each of her causes of action and the trial court erred in sustaining defendants' objections to her evidence. We affirm.

I

FACTS AND PROCEDURAL SETTING

In 2005, Davis invested $360,000 through US Advisor, LLC, in a private offering wherein she purchased an interest in USA Castle Pines, DST. In an arbitration filed with the Judicial Arbitration and Mediation Services, Inc., (JAMS) and in which she sued for damages and sought rescission of the sale, Davis claimed the sale was fraudulent and in violation of a number of provisions in California's Corporate Securities Law (the Castle Pines arbitration). Defendants represented Davis in the Castle Pines arbitration proceeding.

Davis also invested a substantial amount of money through WFP Securities Corporation (WFP) in another matter and allegedly lost a large amount of the money as a result of what she claims were fraudulent investment products. As a result of that loss, the law firm of Diamond Kaplan and Rothstein, P.A., filed a claim on Davis's behalf with the Financial Industry Regulatory Authorities (FINRA) against WFP, its president John Evan Schooler, and Curtis Jerome Sathre III,[1] a registered representative of WFP (the FINRA arbitration). Approximately a year later, Davis discharged her attorneys and retained defendants to represent her in the FINRA arbitration. Davis was also a plaintiff in an action filed in Texas against a number of individuals and entities, including WFP

[1] Except when otherwise required, the defendants in the WFP arbitration are collectively referred to as WFP.

and Sathre, and apparently having to do with securities sold by Sathre to Davis. This action was not filed by defendants; it was filed by Texas attorney Mark Alexander.

Davis prevailed in the Castle Pines arbitration. She was granted rescission, awarded $360,000 for her investment and $80,850 in interest, as well as amounts for the costs of arbitration and attorney fees, less $98,983.76 for the monthly payments that had been made to her under the investment agreement. She did not fare as well in the FINRA arbitration.

Davis filed the FINRA arbitration matter on February 1, 2010. The arbitration panel ultimately concluded Davis failed to prove her allegations by a preponderance of the evidence. The arbiters found the applicable statutes of limitations to Davis's causes of action were from one to four years and that her claims were barred, having determined Davis became aware that WFP's recommended investments were risky when she read the private placement memorandum on April 13, 2005, more than four years prior to the filing of the FINRA arbitration. The panel further found Davis filed the same or similar claims against respondents in the FINRA arbitration in lawsuits filed in Sacramento and Texas, in violation of FINRA rule 12209.[2] The panel also recommended expungement from the records of Schooler and Sathre of all references to Davis's claims.

WFP petitioned the Los Angeles Superior Court to confirm the award in the FINRA arbitration and Davis filed a petition to vacate the award. The superior court confirmed the award and Davis appealed. (*WFP Securities, Inc. v. Davis* (Apr. 15, 2014, B244528) [nonpub. opn.]) (hereafter Slip Opinion).) Our colleagues in the Second

[2] "During an arbitration, no party may bring any suit, legal action, or proceeding against any other party that concerns or that would resolve any of the matters raised in the arbitration." (FINRA rule 12209; hereafter rule 12209.)

District affirmed the judgment, noting the arbitration panel's rulings "were sometimes inconsistent [and] sometimes unaccompanied by any explanation." (*Id.* at p. *1.)[3]

On January 9, 2013, prior to the appellate court's decision in the Castle Pines arbitration matter, Davis sued defendants in the Orange County Superior Court for legal malpractice, breach of fiduciary duty, breach of contract, and intentional infliction of emotional distress.[4] She alleged defendants lacked sufficient skill and learning to act competently in either of the arbitration matters. She asserted that as a result of defendants' incompetence, she was awarded one-half the interests she should have been awarded and was awarded less than one-half the attorney fees and costs she incurred in the Castle Pines arbitration. She further alleged she lost the FINRA arbitration due to defendants' incompetence.

Defendants filed a motion for summary judgment/summary adjudication. The motion asserted Davis could not prove her claims because she could not establish causation or damages in any of her causes of action, she could not establish a breach of the contract, and her action for negligence in the Castle Pines arbitration was barred by the statute of limitations. (Code Civ. Proc., § 340.6.)[5]

---

[3] Below, defendants requested the superior court take judicial notice of the appellate court's decision. It appears the superior court granted that request. Its tentative decision concerning the motion for summary judgment stated the court intended to grant judicial notice as to items in the court's file, which would have included a copy of the appellate court's decision attached to defendants' request for judicial notice. Although the matter was thereafter taken under submission and the subsequent minute order setting forth the ruling on defendants' evidentiary objections and the court's reasons for granting summary judgment did not state the request for judicial notice had been granted, the minute order quoted from the appellate court's decision.

[4] Davis also named as defendants the law firm and attorney who filed her Texas lawsuit in violation of rule 12209.

[5] All further statutory references are to the Code of Civil Procedure unless otherwise stated.

Davis submitted her declaration and the declaration of her attorney David P. Nemecek in opposition to the motion. The court sustained defendants' objections to the vast majority of the declarations and granted the motion for summary judgment. Davis appealed. Additional facts are set forth below where relevant.

II

DISCUSSION

"The purpose of summary judgment is to provide courts a procedural tool to eliminate those 'cases in which there is no ascertainable issue of fact to be tried. [Citations.]' [Citation.] '[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law.' [Citation.] A cause of action is meritless if '[o]ne or more of the elements of the cause of action cannot be separately established . . .' (Code Civ. Proc., § 437c, subd. (*o*)(1)), or the defendant has established an affirmative defense to the plaintiff's causes of action (Code Civ. Proc., § 437c, subd. (*o*)(2)).

"'A defendant moving for summary judgment has the burden of presenting facts to negate an essential element of each cause of action or to show there is a complete defense to each cause of action. [Citation.]' [Citation.] If the defendant meets this showing, the burden then shifts to the plaintiff to present specific facts establishing a triable issue exists as to one or more material facts. [Citations.] 'There is a genuine issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' [Citation.] If the plaintiff then fails to meet her burden, the defendant is entitled to summary judgment. (Code Civ. Proc., § 437c, subd. (c).)

"We review de novo a trial court's ruling on a summary judgment motion. [Citation.] Where the trial court has granted summary judgment, we consider 'all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports.

[Citation.]' [Citation.] In other words, we apply the same rules and standards governing a trial court's decision in ruling on the motion. In so doing, should we find the trial court's ultimate decision was correct, we affirm even if we find the trial court's rationale was incorrect. In other words, '[t]he sole question properly before us on review of the summary judgment is whether the judge reached the right *result* . . . whatever path he might have taken to get there, and we decide that question independently of the trial court. [Citation.]' [Citation.]" (*Baughman v. Walt Disney World Co.* (2013) 217 Cal.App.4th 1438, 1445-1446.)

A. *The Court's Failure to State the Grounds on Which it Sustained Defendant's Objections*

Davis claims the lower court erred in striking evidence she submitted in opposition to the motion for summary judgment. She reasons that as the court did not state the grounds upon which it sustained defendants' objections, the court erred in its rulings. She cites two appellate court decisions in support of her argument.

In the summary judgment motion in *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 249, the defendants' reply to the plaintiff's opposition to the summary judgment motion contained "324 pages of evidentiary objections, consisting of 764 specific objections, 325 of which were directed to portions of plaintiff's declaration, *many of which objections were frivolous*." (Italics added.) The trial court sustained, without explanation, 763 of the 764 objections. (*Id*. at p. 250.) Indeed, some of the objections "did not even assert any basis for the objection!" (*Id*. at p. 255.) The appellate court found the trial court's "'ruling' on defendants' objections was manifestly wrong." (*Id*. at p. 250) In *Twenty-Nine Palms Enterprises Corp. v. Bardos* (2012) 210 Cal.App.4th 1435, the court sustained 39 objections, "some of [which] were unreasonable," to the plaintiff's evidence in a summary judgment motion. (*Id*. at pp.

1437, 1447.) The appellate court concluded it appeared "the trial court did not consider the individual objections." (*Id*. at p. 1447.)

In the present matter, defendants objected to evidence contained in 17 of Davis's 18-paragraph declaration and to evidence contained in five paragraphs of attorney Nemecek's declaration. According to Davis, the court's refusal to state the grounds upon which it sustained the objections rendered the ruling erroneous.

Unlike the objections made in *Nazir* and *Twenty-Nine Palms Enterprises Corp.,* defendants' objections were not frivolous or unreasonable. Defendants' objections were succinct and the basis for the court's decision sustaining the objections is evident. For example, on page two of Davis' declaration, she stated that just before the final hearing in the FINRA arbitration, WFP filed a motion for sanctions against her. Attached to her declaration was a copy of the motion. On one page of her declaration she stated the court denied WFP's motion as untimely. Defendants objected to this evidence as being irrelevant, hearsay, and lacking in foundation. At a minimum, this proffered evidence was irrelevant. To be relevant, evidence must have a "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) At issue in the summary judgment motion was whether the action or inaction of defendants caused harm to Davis in the Castle Pines and FINRA arbitration matters.

Attached as exhibit A to attorney Nemecek's declaration was a portion of Davis's deposition in which she testified that she did not think defendants' were competent to try the FINRA arbitration matter. Her opinion was based, at least in part, on defendants demanding payment from her without providing her with the bills for services rendered. Defendants' objections were well taken. Her conclusion lacked foundation (Evid. Code, § 403) and her belief was an improper opinion (Evid. Code, § 802). Exhibit B, also attached to Nemecek's declaration, was a segment from Brown's deposition. It was apparently offered into evidence to show defendants had not previously handled a securities arbitration matter prior to representing Davis. Defendants objected to the relevance of the transcript. It was irrelevant. At issue in the summary judgment motion was *whether* defendants caused Davis to lose her FINRA arbitration matter. The fact that Brown had not conducted an arbitration before did not tend to prove the loss in the FINRA arbitration matter, filed by other counsel, was proximately caused by Brown's *action or inaction*; not whether Brown had prior experience in such matters. Exhibit C was a selection from Wegner's deposition. It seems to have been offered for the same reason as exhibit B: to show that Wegner had not litigated a securities arbitration before representing Davis. It too was irrelevant.

In her declaration, Davis stated Brown did not address the issue of the statute of limitations in the FINRA arbitration or whether she violated rule 12209 in filing other actions concerning her investments. Davis's declaration further stated she did not attempt to obtain a double recovery by filing multiple actions. Davis also stated that after the respondents in the FINRA arbitration concluded closing argument, the panel chair asked Brown and Wegner, "How do you respond to that? Defendants Brown and Wegner said nothing in response." The court did not err in sustaining the objections to this evidence. Davis did not introduce evidence that the arbitration panel wrongly found her claims were barred by the applicable statutes of limitations. Therefore, the fact the issue may not have been argued by her attorneys was irrelevant. We do not know what the panel chair was referring to in the closing argument of WFP when he asked for Davis's response to the argument. The asking of the question was, therefore, irrelevant. Davis's statement that defendants failed to inform the panel she had not intended to obtain a double recovery by filing multiple actions in violation of rule 12209 is also irrelevant. It does not appear the rule requires such an intent. It simply prohibits multiple actions against the same defendants on the same subject matter. (Rule 12209.)

Additionally, defendants objected to Nemecek's statement that his "firm conducted a review and search of all documents contained in Defendants' files for the

[FINRA] Arbitration. We were unable to locate any documents in Defendants' files that indicate Defendants ever performed any legal research or submitt[ed] any briefing concerning the issue of the application of the statutes of limitation to Plaintiff's claims in the [FINRA] arbitration or the application of FINRA Code of Arbitration Rule 12209 to those claims." The interposed objections, with corresponding Evidence Code citations, were: irrelevant, lack of foundation, improper opinion/speculation, no basis for opinion, and lack of personal knowledge. The grounds asserted were not frivolous. Nemecek stated his "firm" conducted a review of the file. It is unknown who in the law firm conducted that review. There is no evidence it was Nemecek. That being the case, he could not competently testify the files lacked an indication the issues were researched. Again, the issue in the summary judgment motion was *whether* defendants' purported failure to brief the statute of limitations issue prejudiced Davis—i.e., whether the results obtained by Davis in the two arbitration matters would have been different had defendants' acted differently.

The cases cited by Davis are inapposite. They do not support her contention that failure to state the grounds upon which the court based its rulings rendered the rulings erroneous. We reject Davis's assertion that the superior court erred in sustaining objections to her evidence based on the court's refusal to state the basis upon which it ruled.

B. *The Court Did Not Err in Granting Summary Judgment*

There were three causes of action alleged in the first amended complaint at the time the defendants filed their motion for summary judgment: legal malpractice, breach of a fiduciary duty, and breach of contract, the cause of action for intentional infliction of emotional distress having been dismissed pursuant to the defendants' earlier demurrer. "The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, breach of fiduciary duty, and damages. [Citation.]

The elements of a cause of action for professional negligence are (1) the existence of the duty of the professional to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) breach of that duty; (3) a causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional negligence. [Citation.] And the elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff. [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820-821.) Each of these causes of action requires the plaintiff to show the complained of act(s) or omission(s) *and* that Davis was damaged by the act(s) or omission(s). As the defendants noted in their motion for summary judgment, the issue in the case was whether there was a triable issue of a material fact on the question of causation and resulting damage to Davis.

Davis' causes of action are based on defendants' representation in the Castle Pines and FINRA arbitrations.[6] As her claims relate to the Castle Pines arbitration, the evidence shows she prevailed on her rescission claim in that matter. She was awarded the $360,000 she invested as a result of the representations made by the respondents in that matter, "plus interest at the legal rate." She complains, however, that she should have received twice as much interest and it is defendants' fault that she did not. Davis received no award in the FINRA arbitration, which also involved investments she made through WFP. WFP was awarded $136,000 in that matter as costs and fees pursuant to section 1032[7] and based on her violation of rule 12209. She claims that had

[6] The Texas action was not filed by defendants. Texas attorney Mark Alexander filed that action.

[7] "Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (§ 1032, subd. (b).)

defendants performed their jobs competently, she would have prevailed on her claim and would not have been subject to the award for costs and fees. We address first the Castle Pines Arbitration.

1. *The Castle Pines Arbitration*

In a legal malpractice action, "'the elements of causation and damage are particularly closely linked.' [Citation.] The plaintiff must prove, by a preponderance of the evidence, that *but for* the attorney's negligent acts or omissions, [s]he would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred. [Citations.] This standard requires a 'trial-within-a-trial' of the underlying case, in which the malpractice jury must decide what a reasonable jury or court would have done if the underlying matter had been tried instead of settled. [Citation.]" (*Namikas v. Miller* (2014) 225 Cal.App.4th 1574, 1582, italics added.) Simply claiming a more favorable result would have occurred does not suffice. A plaintiff in a legal malpractice action must prove the claimed damage was "'"such as follows the fact complained of as a *legal certainty*." [Citation.]' [Citation.]" (*Ibid.*) That task is made harder where the prior matter was heard by an arbiter. This is because an arbiter is vested with broad discretion in crafting a complete remedy in a rescission action. (See *Kelly Sutherlin McLeod Architecture, Inc. v. Schneickert* (2011) 194 Cal.App.4th 519, 530.) In other words, parties in an arbitration matter may be bound by an award that could not have been properly made in a court of law. (*Ibid.*)

As noted above, Davis's complaint was that she would have received twice the amount of interest she was awarded had defendants not been incompetent. She urged the arbiter to award her $161,700 in interest. He rejected her claim and awarded her $80,850 interest on the $360,000 purchase price. Davis complains that neither Brown nor Wegner argued the issue of interest at the Castle Pines arbitration and instead, a junior assistant did. Davis conceded, however, that defendants briefed the issue. She does not, however, provide any evidence to the effect that the attorney who argued the issue failed to act competently, that defendants' brief was flawed, or that the arbiter would have ruled differently had defendants argued something other than what was argued. Moreover, the respondents in the Castle Pines arbitration matter cited authority for the proposition that under California law, interest in a rescission cause of action only accrues once a demand for rescission has been made. (See *Leaf v. Phil Rauch, Inc.* (1975) 47 Cal.App.3d 371; *Lund v. Cooper* (1958) 159 Cal.App.2d 349.) The arbiter understood the merit of defendants' argument made on Davis's behalf but exercised the broad discretion granted arbiters in crafting a complete remedy when granting rescission. Because it appeared Davis first sought rescission on February 22, 2011, when she filed her claim in the Castle Pines arbitration, "in crafting an equitable remedy," the arbiter concluded Davis was entitled to $80,850 in interest.

Having established that Davis got her investment back with $80,850 in interest, defendants made a prima facie showing that defendants did not commit malpractice and did not breach their fiduciary duty or their contract with Davis. The burden then shifted to Davis to demonstrate the existence of a triable issue of a material fact. (*Baughman v. Walt Disney World Co.*, *supra*, 217 Cal.App.4th at p. 1445.) Accordingly, as the issue in the summary judgment motion was whether Davis could establish causation of damages, she was required to introduce evidence that "'would allow a reasonable trier of fact to find'" defendants' action or inaction caused Davis the loss on another cause of action or the additional interest the arbiter originally intended to award her and attorney fees. (*Ibid*.) This she has failed to do.

Davis failed to introduce evidence to suggest she would have fared better in this arbitration matter but for the alleged conduct or actions of defendants. Although she claims she would have received more in an award for attorney fees, she offers no evidence in support of the contention. In her claim for attorney fees, Davis sought $5,000 by another law firm, Cottle & Keene, that purportedly worked on her case. The arbiter rejected the charge, finding the law firm made no substantial effort in the arbitration and the information supporting the request for that amount was inadequate to establish the reasonableness of such fees. Davis offered no evidence in her opposition to defendants' motion for summary judgment to establish the reasonableness of the fees, or to show the law firm made a substantial effort in the arbitration matter. The failure of the arbiter to award Davis additional attorney fees cannot, therefore, be laid at the feet of defendants based on their alleged incompetence.[8]

What is missing is any evidence to be admitted in a "trial-within-a-trial" to cause a jury to reasonably conclude that had the arbiter heard this evidence, Davis would have fared better in the arbitration. Specifically in connection with the argument that she would have been awarded more interest but for defendants' conduct, the arbiter understood the equity of defendants' argument that one who has been the subject of not being fully informed by the seller cannot seek rescission until she discovers she has not been fully informed and that Davis should be awarded interest from the time of the sale. Notwithstanding the legal and equitable merit of defendants' argument on behalf of Davis, the arbiter split the difference "in crafting an equitable remedy." There is no evidence to support Davis's contention that defendants' alleged negligence was responsible for the decision on the amount of damages.

Because we conclude Davis failed to introduce evidence to show that she was prejudiced in the Castle Pines arbitration by defendants' professional negligence, we need not discuss the statute of limitations issue. We note however, that although defendants maintain the one-year statute of limitation expired prior to Davis filing her complaint in this matter, the one-year period does not begin to run while a plaintiff continues to be represented by the attorney(s) being sued "regarding the specific subject matter in which the alleged wrongful act or omission occurred." (§ 340.6, subd. (a)(2).) Defendants' January 9, 2012 letter to Davis terminating their attorney-client relationship

---

[8] The arbiter found no shortcoming in the rate or time spent on the arbitration by defendants.

specifically stated that "as of" January 9, 2012, not only do defendants no longer represent her in the FINRA arbitration matter, it also no longer represented her on the "Castle Pines" matter.

2. *The FINRA Arbitration*

In connection with the FINRA arbitration, Davis contends defendants' professional negligence, breach of the fiduciary duty they owed her, and their breach of contract caused the arbitration panel dismissing her claims and awarding WFP costs and fees in excess of $136,000 to defendants. In the court's minute order granting defendants summary judgment, the court noted the arbitration panel found Davis's claims "were barred by the applicable statute of limitations" and the panel's conclusion was not the result of defendants' negligence. The court further found Davis failed "to offer legal authority on either the statute of limitations or the sanction issues that 'but for' the negligence of the defendant[s] the ruling by the arbitrator would have been different." The court also found the same failure in connection with Davis's breach of contract claim. The court noted it is not enough to merely argue the defendants should not have withdrawn when they did; there must be a showing of the steps they should have taken and that such action would have resulted in a different outcome. Lastly, the court concluded the FINRA arbitration panel had independent grounds for denying Davis relief. The panel's amended dispute resolution stated Davis failed to prove by a preponderance of evidence any of her claims and her claims were barred by the applicable statutes of limitation.

a. *Dismissal of the arbitration claim*

Davis maintains her claim in the FINRA arbitration was dismissed because the panel found she failed to prove her claim by a preponderance of the evidence as the result of the panel's ruling excluding the testimony of her expert witness, a necessary witness on her claims. Davis named Douglas J. Schulz as an expert witness in the FINRA arbitration. His curriculum vitae stated he regularly testifies as an expert witness in both federal and state courts. (Slip Opinion at p. *5.) Schulz testified clients typically retain him to testify concerning "'rules, laws and regulations of the securities industry; norms and guidelines of brokerage firms; suitability of investments and investment strategies; order execution; evaluation of various investments; damage theories; supervision and compliance.'" (*Id.* at pp. *5-*6.) During an evidentiary hearing, WFP's counsel claimed he did not timely receive documents pertaining to Schulz, in violation of discovery orders made by the arbitration panel. WFP's attorney requested the panel to exclude Schulz's testimony. (*Id.* at p. *6.) One of the arbiters stated he did not believe Davis's counsel attempted to "sandbag" WFP and the hearing could "'just move on.'" (*Id.* at p. *7.)

Schulz then began his testimony. (Slip Opinion at p. *7.) After he testified to his qualifications, the panel permitted WFP's attorney to voir dire him. Upon completion of voir dire, WFP's counsel moved to exclude Schulz's testimony, arguing Schulz lacked experience in the brokerage area, his National Association of Securities Dealers, Inc. (NAS) licenses were out of date, Schulz had not been in the retail business for more than 20 years, he had never been a compliance officer in the brokerage business, never supervised a representative of a brokerage firm, and there was no evidence Schulz "'ever conducted due diligence on any of the products that are at issue here or any products that are similar to the ones at issue here.'" (*Id.* at pp. *7-*9.) The panel granted the motion to exclude Schulz's testimony. (*Id.* at pp. *10, *13.) When the panel issued its award, however, the panel "gave a different reason for excluding Schulz than the reason they had indicated at the hearing." (*Id.* at pp. *12-*13.) The award stated Schulz's testimony was excluded for noncompliance with the panel's discovery orders. (*Id.* at p. *13.)

The fact that the panel originally granted WFP's motion to exclude Schulz's testimony because he did not qualify as an expert cannot be laid at the feet of defendants. Davis does not contend defendants should have realized Schulz was not competent to testify as an expert. Nor does it appear she could. According to Schulz, he testified over 600 times in arbitration and court matters as an expert. (Slip Opinion at pp. *7-*8.) The panel's award ultimately stated Schulz's testimony was excluded based on a discovery violation. However, as stated above, after WFP voir dired Schulz on his qualifications, WFP moved to exclude his testimony because he lacked the proper qualifications to testify as an expert witness. That motion was then granted. Consequently, we cannot say with any confidence a reasonable jury could find that but for the alleged malpractice (violation of discovery orders) the evidence would have been admitted and Davis's claim would not have been dismissed. This is especially true because there was no showing as to what Schulz would have testified. That being the case, it cannot be concluded the outcome would have been different had the witness been allowed to testify. Additionally, because the panel found Davis's claims were barred by the applicable statutes of limitation, we find Davis did not demonstrate a dispute as to a material issue of fact in connection with the exclusion of Schulz's testimony.

b. *Defendants' Withdrawal as Counsel*

Defendants' withdrawal from their representation of Davis is alleged as the reason the arbitration panel sanctioned Davis for violating rule 12209 and granted Schooler and Sathre's motion to expunge their files of any reference to her complaints against them.

Defendants informed Davis via e-mail on January 8, 2012, that she had one day—until 5:00 p.m. on January 9, 2012—to make satisfactory arrangement for the payment of their invoice for services rendered or they would withdraw from further representation. The e-mail notifying Davis was sent at 8:03 p.m. When such arrangements were apparently not made within the less than 24 hours defendants gave Davis, defendants withdrew from their representation. It appears, however, that in the interim, Schooler and Sathre made an expungement request to the arbitration panel. Although defendants gave Davis until 5:00 p.m., on January 9, 2012, to make arrangements for payment of their outstanding bill(s), defendants were notified by the FINRA tribunal shortly after 9:30 a.m., on January 9, that there had been an expungement request and they were given a briefing schedule for that issue. The defendants were notified of this issue prior to their withdrawal from the case.

Pursuant to California Rules of Professional Conduct, rule 3-700(A)(1), when a tribunal has a rule requiring permission for an attorney to withdraw, an attorney may not withdraw from representation from a proceeding pending before the tribunal without the tribunal's permission. Although there is no evidence FINRA had such a rule, that is not determinative of whether defendants violated California Rules of Professional Conduct, rule 3-700(A)(2): "A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules."

Although defendants contend their withdrawal from their representation of Davis in the FINRA arbitration occurred after the final arbitration hearing, that's not totally accurate. Notwithstanding the fact that Davis's claims in the FINRA arbitration matter were under submission prior to defendants' withdrawal, counsel were not only informed by the FINRA tribunal that there had been a request for expungement, they were also provided a briefing schedule. There was no evidence defendants' took any steps to avoid prejudice to Davis by their withdrawal, or that they allowed sufficient time for her to retain new counsel; she was given less than 24 hours' notice of their intent to withdraw and they effectively withdrew even before the impossibly short deadline they imposed on Davis when, the next morning, they forwarded to Davis the briefing schedule on the expungement issue.

The Rules of Profession Conduct may be used to define the scope of an attorney's fiduciary duty to a client, taking also into consideration, "'statutes and general principles relating to other fiduciary relationships.'" (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086.) Of course, "a violation of the Rules of Professional Conduct does not, in and of itself, render an attorney liable for damages. [Citations.]" (*Id.* at p. 1097.) Causation is a necessary element of a cause of action for breach of a fiduciary duty. (*Oasis West Realty, LLC v. Goldman, supra*, 51 Cal.4th at pp. 820-821.) While there certainly existed a triable issue of material fact on the issue of the breach of a fiduciary duty—Davis had basically no time in which to retain new counsel prior to defendants abandoning her—there is a lack of evidence on the issue of causation in connection with the panel recommending expungement of Schooler and Sathre's files.

A FINRA member or person associated with a member may seek expungement "from the [Central Registration Depositiory] system arising from disputes with customers." (FINRA rule 2080(a).) The order granting expungement must be issued by a court of competent jurisdiction. (*Ibid.*) Ordinarily, FINRA must be noticed in a request to a court for an order granting expungement. (FINRA Rule 2080(b).) That notice may be waived when relief is based on an affirmative judgment or arbitral finding that the claim was "factually impossible or clearly erroneous" (FINRA rule 2080(b)(1)(A)) and the registered person was "not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds" (FINRA rule 2080(b)(1)(B)), or the claim was false (FINRA rule 2080(b)(1)(C)).

On February 2, 2012, the panel held a telephonic hearing so the parties could present evidence and argument on the issue of whether there should be an expungement recommendation. The recording from that hearing is not part of the appellate record in this matter. The trial court did not have the recording before it either. Therefore, we do not know what evidence, if any, Davis submitted in the FINRA arbitration after defendants withdrew. The FINRA arbitration panel recommended expungement of Schooler and Sathre's files. The Los Angeles County Superior Court confirmed the arbitration award expunging from their files all references to the arbitration. (Slip Opinion at pp. *1-*2.) Still, we fail to see how such an order harmed Davis. The purpose of including a member or associate's file references to complaints involving their actions appears to be to protect investors and "the integrity of the [Central Registration Depository] system or regulatory requirements." (FINRA rule 2080(b)(2)(B).) Davis, contrary to the general public, was aware of Schooler and Sathre's involvement in the FINRA arbitration and the sales underlying her claim. Having lost her arbitration matter, Davis was not further harmed by the order expunging Schooler and Sathre's files. In other words, that relief was not per se *against* Davis's interests. Additionally, Davis did not introduce any evidence below as to what evidence should have been offered at the hearing that was not offered and what arguments that were not made should have been. Thus, even assuming defendants breached their fiduciary duty to Davis by abandoning her at that point in the litigation, Davis failed to demonstrate the breach caused her to lose the expungement issue or that the decision on the issue of expungement damaged her.

We next review whether defendants' abandonment resulted in the FINRA arbitration panel sanctioning her for violating rule 12209. During defendants' representation of Davis in the FINRA arbitration, WFP made a motion to sanction her for violating rule 12209. Davis faults defendants for not briefing the merits of the motion, however, defendants argued the motion was untimely and the panel denied the motion based on defendants' argument. We do not find the failure to address the merits of the issue to have been malpractice. Defendants offered an appropriate reason for denying the request and the panel agreed with it. That is not malpractice.

Even were we to consider Davis's statement in her declaration that Schooler and Sathre's attorney took advantage of the absence of defendants from the hearing on the expungement motion to argue Davis should be sanctioned for violating rule 12209, there is no evidence defendants' absence resulted in the finding she violated the rule when she had other counsel file the Texas action. The evidence that Davis filed other actions concerning the matter under consideration in the FINRA arbitration was incontrovertible. As she conceded below, she named WFP and Sathre as defendants in the Texas lawsuit.

Davis says she did not file the other actions in an effort to make a double recovery. Although the arbitration panel found that appears to have been her intention, there is nothing in rule 12209 requiring such an intent, and Davis points us to no authority for such a proposition.

Additionally, the arbitration panel's award of $135,755.89 to WFP was ordered for "costs and expert witness fees pursuant to FINRA Code rule 12209, and the California Code of Civil Procedure [section] 1032." Thus, the panel had alternative grounds upon which it made the award. Section 1032, subdivision (b), provides: "Except as otherwise expressly provided by statute, a prevailing party is entitled *as a matter of right* to recover costs in any action or proceeding." (Italics added.) Other than contending she should not have lost the FINRA arbitration matter, Davis does not assert the amount awarded WFP was improper under section 1032. That being the case, even were we to conclude defendants' sudden withdrawal from representation proximately caused the arbitration panel to conclude Davis violated rule 12209, there is no evidence the amount awarded WFP was caused by the withdrawal. If WFP was entitled to the awarded fees and costs pursuant to section 1032, the fact that the arbitration panel also listed the violation of rule 12209 as an alternative basis for the award did not damage Davis.

C. *Conclusion*

As it relates to the Castle Pines arbitration, Davis was granted rescission and awarded $360,000 plus more than $80,000 in interest. She failed to produce evidence that the arbiter would have awarded more interest or found in her favor on another cause of action if defendants had acted differently. As it relates to the FINRA arbitration panel, Davis failed to produce evidence that the arbitration panel would have found in her favor and would not have awarded WFP costs and fees had defendants acted differently. Although we find the recommendation in favor of expungement did not prejudice Davis, the fact that she failed to demonstrate the panel would have found in her favor on the merits of her claims had defendants performed differently, means that even if granting expungement was to her prejudice, it was not caused by defendants' incompetence; the motion was granted because Davis's claims were dismissed.

III

DISPOSITION

The judgment is affirmed. Defendants are entitled to recover their costs on appeal.

MOORE, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.